Brawley Beef, L.L.C. *and* Martha Marquez *and* Lorena Rivas. Cases 21–CA–35031–1 and 21–CA–35031–2

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On March 18, 2003, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Brawley Beef, L.L.C., El Centro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following paragraph for 2(a) and reletter the subsequent paragraphs:

"(a) Within 14 days from the date of this Order, offer Martha Marquez and Lorena Rivas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make Martha Marquez and Lorena Rivas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

3. Substitute the following relettered paragraphs for 2(d) and (f).

"(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

"(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they concertedly complain about wages, hours, or other terms and condition of employment.

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging Martha Marquez and Lorena Rivas, and his related credibility findings in favor of Marquez and Rivas, we do not rely on the judge's statement that "there is nothing in the separation notices indicating that [Marquez and Rivas] had refused to do the work required or told Cota they would not." Arguably, the judge's statement is incorrect. We therefore do not rely on it. Similarly, we do not rely on the judge's basis for discrediting Elizabeth Cota's testimony that, when she spoke with Marquez and Rivas, the employees refused to do their assigned work, and that such refusal was the reason for terminating the two. The judge found that this was improbable because, according to the judge, Cota did not record that fact on the separation notices.

Even discounting the two matters mentioned above, the evidence establishes that there was in fact no refusal to do work. Regino admitted that lead person Medrano had assured her that "everything was running okay and . . . they [Rivas and Marquez] were working." She also admitted that she did not personally observe the situation at Rivas' and Marquez' workstations before she drafted the separation notices. The judge also credited denials by Marquez and Rivas that they refused to work. In these circumstances, and in light of the deference we give to the credibility findings by a judge, who observes the witnesses, we will not disturb the judge's findings.

[2] We shall also reflect these modifications in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files any reference to the unlawful discharges of Martha Marquez and Lorena Rivas, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Martha Marquez and Lorena Rivas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their senirity or any other rights or privileges previously enjoyed.

WE WILL make Martha Marquez and Lorena Rivas whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

BRAWLEY BEEF, L.L.C.

Stephanie Cahn, Esq., for the General Counsel.
Gregg J. Tucek, Esq., of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on January 22, 2003, at El Centro, California, on the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act, by terminating the two Charging Parties on March 15, 2002,[1] for having engaged in protected concerted activity.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Martha Marquez and Lorena Rivas were discharged because they refused to do their assigned work.

On the entire record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a California corporation engaged in the business of beef processing at a facility in Brawley, California. In the course and conduct of this business, the Respondent annually purchases and receives at its facility goods, products, and materials directly from points outside the State of California valued in excess of $50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 2002, unless otherwise indicated.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent began operations on December 24, 2001, and now has about 700 employees engaged in various aspects of beef processing. Included in this process is the operation of Super Vac machines on six lines. Machine operators pick up cuts of meat and from a conveyor belt and place them on a machine to be sealed, vacuumed, and dried. Line one processes beef rounds, which weigh an average of 10 pounds; however, Martha Marquez testified that at least on her last day, in addition to rounds there were other, heavier, cuts. Typically two employees are assigned to a machine

On March 15, Marquez was assigned as the operator on line one and after a short time, Rivas was assigned to help on line one. Rivas had returned to full duty that day, having worked the previous 3 months on limited lifting due to a hand injury. Marquez testified that the meat she was lifting was not too heavy, but cuts that Rivas had, apparently from another conveyor belt, were heavy. Rivas complained to Marquez about the heaviness of the meat she had to lift and Marquez agreed, having come over to Rivas' side to help her. They discussed this issue, although continuing to work, and concluded that a man should be assigned to the line to help lift the heavier cuts.

They complained to Cecilio Albanez, the trainer, who helped for a while, and then he left. They subsequently complained to Carman Clayton, a lead person under Debbie Regino, the then supervisor in packaging. Clayton said she would talk to Regino. Clayton returned and told them that Regino said they had to do their job. Later Marquez told Clayton they wanted to speak to the supervisor above Regino and unable to do so, asked to speak to Jose Castaneda, the fabrication superintendent. Then about 10:30 a.m., Patricia Madrano, another lead person, told them to report to personnel after lunch.

According to Regino, Albanez came to her and said that Marquez and Rivas "were refusing to do the work. That they did not want to be on that line." She told him to tell Marquez and Rivas that they had just started their rotation (a system put into effect the day before) and they would have to work on that machine for a week. Then Madrano told Regino that Marquez Rivas "didn't want to be on that machine because the product was too heavy, and they were refusing to do the work over there." That they were actually refusing to work Regino knew not to be true, since she asked, "Are they keeping up?" and Madrano told her they were. Then somewhat later, Clayton came to her with a report that Marquez and Rivas "did not want to be on that machine, that the meat was heavy." Regino also asked Clayton if everything was running okay, and she said, "[Y]es."

Regino testified that after she finished what she was doing, and after a second report that Marquez and Rivas wanted to talk to Castaneda, she went looking for Castaneda. She could not find him, but she did locate Sam Falk, who apparently is the next step above Castaneda. She explained the situation to Falk, who told her that since she had explained the rotation system to everyone the day before she should send Marquez and Rivas to human resources.

Regino reported to Human Resources Manager Elizabeth Cota. Cota told Regino to prepare separation notices for Marquez and Rivas and to have them report to her after lunch. Cota testified that her investigation consisted only of reviewing the personal files of Marquez and Rivas and talking to Regino. Cota testified that she first talked to Marquez and Rivas separately and then to them together in the presence of Regino. As a result of these discussions, Cota decided to discharge them and signed the previously prepared separation notices, which read in material part:

> What was the Final Circumstance Leading to Separation? (Printed on form.) Unsatisfactory Employee. Unwilling to do the work required. Complaining of work too hard, too heavy, too fast, etc. The two former operators are women & able to do the work. (In handwriting, presumably Regino's.)

Cota testified that they were before her

> [B]ecause I wanted to make sure that they were not refusing to do the job, but I asked them, I asked Lorena and Martha, "If I put you back on the line, are you going to do the job," and they said, "No, we're not going to do that job." And so after hearing them say that, then that's when I used Debbie's form, the separation notice. I used it to terminate their employment with us."

Marquez and Rivas denied that they were asked by Cota if they would do their job and said they would not.

B. Analysis and Concluding Findings

The General Counsel contends that the Respondent terminated Marquez and Rivas for engaging in concerted activity protected by the Act—complaining about the heavy lifting they were required to do. The Respondent argues that they were not discharged for complaining. They were discharged because they had refused to do their job and when asked by Cota if they would work on the line, they said they would not.

There is little question that the weight required to be lifted is a working condition and that the complaints by Marquez and Rivas were concerted. See generally *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). While the *Meyers* holding has been recently questioned by former Chairman Gould and former Member Browning without elaboration [*Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995); *Liberty Natural Products*, 314 NLRB 630 (1994)], it continues to form the basis for analyzing when activity of employees is concerted. Though in the very early stages of what might have lead to group action, I conclude that the joint complaints by Marquez and Rivas amounted to concerted activity. I note that the heaviness issue was first raised by Rivas, since she had just returned from limited duty and was assigned a job where the meat was heavier than that which Marquez was lifting. However, Marquez soon joined in the complaint, and was the spokesperson for an issue common to both. (Marquez is bilingual. Rivas is not.)

The Respondent does not question either that complaining about the heaviness of work is protected or that the complaints of Marquez and Rivas were concerted. The basic argument of the Respondent was that Marquez and Rivas had refused to do their assigned jobs and when confronted by Cota said they would not do the work. They were therefore changing the work rules and their action was not protected. Whether they in fact refused to do their assigned duties, and told Cota that they would not even if she returned them to the line is the principal fact of issue in this matter. On this, there is a direct credibility conflict between Cota/Regino and Marquez/Rivas, I credit Marquez and Rivas and discredit Cota and Regino.

First, there is nothing in the separation notices indicating that they had refused to do the work required or told Cota they would not. If, as Cota testified, the reason Marquez and Rivas were discharged was because they told her they would not work on the line to which they were assigned, surely such would have been noted on their separation notices.

While Regino repeatedly testified that they were refusing to work, she also repeatedly testified that on asking her lead persons if everything was running okay, she was told it was. Noone testified that they observed Marquez and Rivas not doing their assigned tasks. The sum of the Respondent's witnesses is that they did the work, but did not want to because of some of the meat was too heavy, and wanted to have this situation rectified. Regino testified that their complaint had been that the job they were required to do was unsafe for women and that men should be assigned to lift the heavier cuts. The fact that Regino disagreed, testifying that women had been doing the job, does not disprove the protected concerted nature of the employees' complaint.

I conclude that Marquez and Rivas were discharged because they complained about the heaviness of the product they were required to lift and that such, in this context, was concerted activity protected by the Act. Accordingly, I conclude that the Respondent violated Section 8(a)(1) in discharging them. I reject the Respondent's contention that because it had not discharged others for complaining about working conditions, it did not discharge Marquez and Rivas for this reason. The testimony Cota and Regino about other complaints is simply too general to be of much relevance to this situation.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering Martha Marquez and Lorena Rivas reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any loss of wages and other benefits they may have suffered, with interest, in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Brawley Beef, L.L.C., El Centro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they make concerted complaints about wages, hours, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Martha Marquez and Lorena Rivas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in El Centro, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order. The notices will be both in English and Spanish.

(e) Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."